SP Annamalai a/l Subramaniam Chettiar v Perbadanan Pembangunan Bandar

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-132 OF 1996

SHAIK DAUD, SITI NORMA YAAKOB AND DENIS ONG JJCA

18 FEBRUARY 2000

Land Law *— Sale of land — Appellant was not registered owner of property — Respondent offered to purchase property from appellant —Appellant through nominee will purchase property from registered proprietors — Admissions by respondent of its knowledge that transactions were to be carried out on a back to back basis — Whether contract existed between appellant and respondent — Whether breach of agreement*

The appellant is an option holder for a property known as Lot 2084 section 41, Kuala Lumpur ('the property') with power to sell the property to the respondent. At all times, the appellant was not the registered proprietor of the property and this is known from the beginning by the respondent. The respondent had offered to purchase the property from the appellant and the appellant had accepted the offer. The appellant had informed a representative of the respondent that: (a) the appellant through a nominee, one Sulaiman Daud, will purchase the property from the registered proprietors; and (b) the nominee, Sulaiman Daud, will execute a sale and purchase agreement with the respondent to sell the property to the respondent for a sum of RM1,218,560. The appellant's solicitors prepared a draft agreement to be sent to the respondent. The respondent in return indicated their satisfaction with the draft agreement and thereafter on 25 April 1990 the same solicitors prepared four final copies of the agreement and transmitted them to the respondent for its execution. The respondent refused and failed to sign the agreement. The appellant claims for loss of profits arising from the respondent's breach of contract. The respondent contended that it was its sole intention from the very beginning to deal solely with the registered owners and would only execute a sale and purchase agreement with them. The respondent denied that it had agreed to bind itself with either the appellant or his nominee. The learned judge had dismissed the appellant's claim with costs broadly on the ground that although the respondent had agreed to purchase the property, the agreement between it and the nominee, Sulaiman Daud, shows that Sulaiman Daud was the registered owner of the property when at all material times, Sulaiman Daud, had not executed the agreement with the original registered owners. The appellant appealed.

Held, allowing the appeal:

(1) The learned judge failed to examine the contemporaneous documents which would conclude that the respondent was aware from the very beginning that the appellant was not the registered owner of the property and he had entered into the transaction

solely for profit. The evidence of the sole witness for the respondent if properly analysed entailed the premise that he knew all along that the appellant was not the owner of the property and hence the need to have the back to back transaction (see p 453F–H).

(2) It is evident from the series of contemporaneous correspondences between the appellant and the respondent that it was agreed between the parties that the sale and purchase agreement between the appellant and the respondent would be signed first, to enable the appellant to obtain the necessary funds to sign the agreement with the land owners. There is clear evidence from the appellant's solicitor explaining the mechanics of how this back to back transaction was to work and all along was within the knowledge of the respondent (see p 454D–E).

(3) From the totality of the evidence, a contract existed between the appellant and the respondent on 25 April 1990 when the respondent confirmed the final draft of the agreement. The respondent then aborted the agreement with the appellant by its letter dated 25 May 1990 wherein for the very first time it raised the issue of the appellant or his nominee, Sulaiman Daud, not being the registered owner of the property when at all material times it was aware of the actual circumstances (see p 454F–H). The respondent had breached the agreement with the appellant resulting in his loss of profits which is the natural consequence of the breach (see p 455C).

[Bahasa Malaysia summary

Perayu adalah pemegang opsyen ke atas harta tanah yang dikenali sebagai Lot 2084, Seksyen 41, Kuala Lumpur ('hartanah tersebut') dengan kuasa untuk menjual hartanah tersebut kepada responden. Pada semua masa material, perayu bukanlah tuan punya berdaftar ke atas hartanah tersebut dan ini diketahui dari mula lagi oleh responden. Responden telah membuat tawaran untuk membeli hartanah tersebut daripada perayu dan perayu telah menerima tawaran tersebut. Perayu telah memberitahu wakil responden bahawa: (a) perayu melalui penerima namaannya, Sulaiman Daud, akan membeli hartanah daripada tuan punya berdaftar; dan (b) penerima namaan, Sulaiman Daud akan melaksanakan perjanjian jual beli dengan responden untuk menjual hartanah tersebut kepada responden untuk RM1,218,560. Peguam perayu telah menyediakan empat deraf perjanjian untuk dihantar kepada responden. Responden membalas dengan menunjukkan kepuasan mereka dengan perjanjian deraf tersebut dan selepas itu apabila pada 25 April 1990 peguam yang sama telah menyediakan empat salinan terakhir perjanjian tersebut dan menyerahkannya kepada responden untuk dilaksanakan, responden enggan dan gagal untuk menandatangani perjanjian tersebut. Perayu menuntut untuk kehilangan keuntungan yang timbul daripada pelanggaran kontrak responden. Responden menegaskan bahawa adalah niat sebenar

perayu dari mula lagi untuk berurusan dengan tuan punya berdaftar sahaja dan hanya akan melaksanakan perjanjian jual beli dengan mereka. Responden menafikan bahawa beliau bersetuju untuk mengikat dirinya sendiri dengan perayu atau penerima namaannya. Hakim yang arif telah menolak tuntutan perayu dengan kos atas alasan bahawa walaupun responden bersetuju untuk membeli hartanah tersebut, perjanjian antaranya dan penerima namaan, Sulaiman Daud, menunjukkan Sulaiman Daud adalah tuan punya berdaftar harta tanah tersebut tetapi pada semua masa, Sulaiman Daud, belum lagi melaksanakan perjanjian dengan tuan punya berdaftar yang asal. Perayu telah merayu.

Diputuskan, membenarkan rayuan:

(1) Hakim yang arif gagal untuk menilai dokumen-dokumen yang sedia ada yang akan menyimpulkan bahawa responden sedar dari mula lagi bahawa perayu bukanlah tuan punya berdaftar hartanah tersebut dan beliau telah memasuki transaksi tersebut hanya untuk keuntungan semata-mata. Keterangan saksi tunggal responden jika dinilai dengan wajar akan menunjukkan bahawa beliau tahu dari mula lagi bahawa perayu bukanlah tuan punya hartanah tersebut dan dengan itu terdapat keperluan untuk mempunyai transaksi dua peringkat (lihat ms 453F–H).

(2) Adalah terbukti daripada surat-menyurat yang sedia ada antara perayu dan responden bahawa adalah dipersetujui antara pihak-pihak bahawa perjanjian jual beli antara perayu dan responden akan ditandatangani dahulu, untuk membolehkan perayu memperolehi kewangan yang diperlukan untuk menandatangani perjanjian dengan tuan punya-tuan punya hartanah tersebut. Terdapat keterangan yang jelas daripada peguam perayu yang menjelaskan bagaimana perjanjian dua peringkat ini akan dijalankan dan dari mula lagi berada di dalam pengetahuan responden (lihat ms 454D–E).

(3) Daripada keseluruhan keterangan, suatu kontrak telah wujud antara perayu dan responden pada 25 April 1990 apabila responden mengesahkan deraf terakhir perjanjian tersebut. Kemudian responden membatalkan perjanjian tersebut dengan perayu melalui suratnya yang bertarikh 25 Mei 1990 di mana buat pertama kali ia membangkitkan isu bahawa perayu atau penerima namaannya, Sulaiman Daud, bukan tuan punya berdaftar hartanah tersebut apabila pada semua masa matan responden sedar akan keadaan-keadaan yang sebenar (lihat ms 454F–H). Responden telah melanggar perjanjian tersebut dengan perayu menyebabkan kehilangan keuntungan yang merupakan akibat biasa daripada pelanggaran tersebut (liaht ms 455C).]

Notes

For cases on breach of contract of sale of land, see 8 *Mallal's Digest* (4th Ed, 1997 Reissue) at paras 2880–2902.

For cases on whether there was a contract for sale of land in existence, see 8 *Mallal's Digest* (4th Ed, 1997 Reissue) at para 3269.

Cases referred to

Brickles v Shell [1916] 2 AC 599 (refd)

Halimah bte Abdul Rahman v Fatimah bte Abdullah [1976] 2 MLJ 64 (refd)

Sinniah all Pampayan v Muthuvelu Pillai a/l Palanichamy Pillai [1997] 1 MLJ 403 (refd)

Appeal from: Civil Suit No S4–22–275–91 (High Court, Kuala Lumpur)

Maidzuara Mohamed (*Mohd Izral Khairy*) (*Logan Sabapathy & Co*) for the appellant.

Ramid Khan (*Zainur Zakaria & Co*) for the respondent.

Shaik Daud JCA (delivering judgment of the court): This is an appeal from the decision of the High Court Kuala Lumpur which had dismissed the appellant's claim against the respondent. The appellant's claim essentially is for loss of profits arising out of the respondent's alleged breach of contract.

The background facts are that the appellant is an option holder for a property known as Lot 2084 section 41, Kuala Lumpur ('the property') with power to sell the said property to the respondent. It is not disputed that at all times, the appellant was not the registered proprietor of the said property and this is known from the beginning by the respondent. In fact the said property was jointly owned by seven persons living in different parts of the world and this too is known to the respondent. Through negotiations and meetings held from 14 December 1989 the respondent had offered to purchase the said property from the appellant at RM64 per sq foot. The appellant had accepted the offer. According to the appellant, at a meeting on 17 April 1990 at the office of Messrs Zain & Co a firm of solicitors in Kuala Lumpur, the appellant had informed a representative of the respondent that:

(a) the appellant through a nominee, one Sulaiman Daud, will purchase the said property from the registered proprietors; and

(b) the nominee, Sulaiman Daud, will execute a sale and purchase agreement with the respondent to sell the said property to the respondent for a sum of RM1,218,560.

To achieve the above objectives, the parties would prepare and execute back to back agreements in that the nominee, Sulaiman Daud, would sign the sale and purchase agreement with the respondent in order to get the deposit from the respondent and using this money, the nominee, Sulaiman Daud, will execute a sale and purchase agreement with the registered proprietors. It is the contention of the appellant that the respondent was at all material times aware of this back to back transaction.

Subsequent to the meeting of 17 April 1990, another meeting was held at the office of the respondent where the officers of the respondent, the appellant and the nominee, Sulaiman Daud, were present and thereafter the respondent had instructed a sale and purchase agreement to be prepared by the solicitors Messrs Zain & Co. As a result Messrs Zain & Co prepared a draft agreement to be sent to the respondent. The respondent in return indicated their satisfaction with the said draft agreement and thereafter on 25 April 1990 the same solicitors prepared four final copies of the agreement and transmitted them to the respondent for its execution. The respondent refused and failed to sign the agreement and thereby refused to proceed with the sale and purchase of the said property resulting in the appellant and his nominee not being able to purchase the said property from the registered proprietors.

The respondent on the other hand denied the averments of the appellant and contends that it was its sole intention from the very beginning to deal solely with the registered owners and would only execute a sale and purchase agreement with them. The respondent contended that the sale fell through as the appellant had failed to arrange for the execution of the sale and purchase agreement with the registered proprietors or their attorneys. The respondent denied that it had agreed to bind itself with either the appellant or his nominee.

The learned judge had dismissed the appellant's claim with costs broadly on the ground that although the respondent had agreed to purchase the said property but the agreement between it and the nominee, Sulaiman Daud, shows that Sulaiman Daud was the registered owner of the said property when at all material times, Sulaiman Daud, had not executed the agreement with the original registered owners. The learned judge also held that the option granted to the appellant had lapsed when he sought to transact the back to back agreements and that the sale of the said property to Sulaiman Daud was subject to obtaining an order of the court by one of the co-owners.

We are of the view that the learned judge erred in that he failed to examine the contemporaneous documents which would conclude that the respondent was aware from the very beginning that the appellant was not the registered owner of the said property and he had entered into the transaction solely for profit.

The learned judge appeared to have failed to consider and appreciate seriously the evidence of the sole witness for the respondent one Kamarzaman bin Kamaludin, especially on his admissions. His evidence if properly analysed entailed the premise that he knew all along that the appellant was not the owner of the said property and hence the need to have the back to back transaction. He knew the true identity of the owners whose solicitors were Messrs Shearn Delamore & Co. The learned judge appeared to have neglected to consider or consider sufficiently the handwritten note dated 25 April 1990 by Kamarzaman to the appellant (see p 153 of appeal record) where he acknowledged receipt of the sale and purchase agreement from Messrs Zain & Co and that 'they would sign first and return the same

to Messrs Zain & Co on 3 May 1990'. When this note was sent to the appellant, Kamarzaman knew the actual situation as to the ownership of the said property. Inspite of this, the respondent was prepared to sign the agreement. In the light of this evidence, Kamarzaman's evidence of his understanding that Sulaiman Daud would purchase the said property from the owners first and then only would sell it to the respondent should not be accepted as the truth. The evidence of the solicitors acting for the appellant also confirmed the need to execute the back to back transactions was as per instructions that the appellant was to utilise the payments from the respondent to purchase the said property. Hence the need, as confirmed by Kamarzaman in his handwritten note to the appellant, for the respondent to sign the sale and purchase agreement with Sulaiman Daud first before Sulaiman Daud needed to sign the agreement with the owners. The fact that Kamarzaman knew that the agreement between Sulaiman Daud and respondent was to be signed first was further enhanced by the evidence that there was a request by the appellant for the respondent to pay the 10% deposit direct to the landowners or to the appellant's solicitors, Messrs Zain & Co.

Therefore it is evident from the series of contemporaneous correspondences between the appellant and the respondent that it was agreed between the parties that the sale and purchase agreement between the appellant and the respondent would be signed first, to enable the appellant to obtain the necessary funds to sign the agreement with the land owners. There is clear evidence from the appellant's solicitor explaining the mechanics of how this back to back transaction was to work and all along was within the knowledge of the respondent. Therefore, when the learned judge held the reverse, it went against the evidence adduced.

The issue finally was whether a contract existed between the appellant and the respondent and if so, when. From the totality of the evidence we were satisfied that a contract existed between the appellant and the respondent and this was on 25 April 1990 when the respondent confirmed the final draft of the agreement. From that date onwards a contractual relationship existed between the appellant and the respondent. We were also satisfied that from a series of contemporaneous correspondences between the solicitors for the appellants and the solicitors for the landowners, a contractual relationship existed between the landowners and the appellant. The respondent aborted the agreement with the appellant by its letter dated 25 May 1990 wherein for the very first time it raised the issue of the appellant or his nominee, Sulaiman Daud, not being the registered owner of the said property when at all material times it was aware of the actual circumstances. This sort of transaction was not uncommon. A vendor having neither a title nor the power to obtain a title was not prevented to enter into a contract to sell land or for that matter any chattel, provided he promised to transfer the title on acquiring it. If he failed to do so, the vendor would be equally entitled to be sued for specific performance. The fact that at the date of the contract the vendor had neither the title nor the power to call for the title is itself no answer to a suit for specific performance by either party (see *Brickles v Shell* [1916] 2 AC 599; *Halimah*

bte Abdul Rahman v Fatimah bte Abdullah [1976] 2 MLJ 64; and *Sinniah all Pampayan v Muthuvelu Pillai a/l Palanichamy Pillai* [1997]1 MLJ 403).

In the present case, if the reverse took place, ie if the appellant failed to transfer the said property to the respondent after it had been transferred to him or his nominee, the respondent could successfully sue him for specific performance. It came to light that subsequently the state authority acquired the said property for the respondent and this might well explain the reason for the respondent aborting the back to back transaction.

Therefore, in view of the admissions by the respondent of its knowledge at all material times that the transactions were to be carried out on a back to back basis and in the light of the contemporaneous documents and the totality of the evidence, we were satisfied that the respondent had breached the agreement with the appellant resulting in his loss of profits which in our view is the natural consequence of the breach. We, therefore, allowed the appeal with costs here and below, set aside the order of the High Court and entered judgment in favour of the appellant in terms of prayers (a), (b) and (e) of his statement of claim. We also ordered the deposit be refunded to him.

Appeal allowed.

Reported by Benjamin Yong